

# Comment : A Victorian Legal Legacy – the Bespoke Tribunal

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The creation of the Council on Tribunals in 1958 was the first major step in rationalising a new legal institution which had evolved and grown astonishingly in the previous fifty years. It was both an affirmation of the immense importance of the tribunal genre and an acknowledgement of the urgent need for its rationalisation. Nearly fifty years later, the importance of the tribunal as a dispute-resolution body is self evident: it forms the most likely forum for the resolution of most individual citizens' disputes, covering a wide range of social, public and political matters. It dominates civil adjudication in this country, surpassing the courts of law in terms of numbers of disputes heard and resolved, and is effective, accessible and cost efficient. Furthermore, modern reforms have achieved, if not a sound classification, at least a real collective identity for tribunals and the beginning of a policy of uniformity. And yet this legal institution, a form of dispute-resolution reflecting very modern notions of access to justice and occupying such an important place in contemporary adjudication, is a creation of Victorian legislators during a relatively short period in the mid-nineteenth century. In researching the legal history of tribunals, the clear inevitability of a legacy of almost insuperable problems for future legislators of rationalisation and classification, were the tribunal as an institution to survive, is striking. The analysis of jurisdiction, procedures and personnel which would prove an almost intractable problem for the many expert official reviews and for the Council in its early years was the direct consequence of the tribunal's historical genesis.

The tribunal emerged from the response of government and law to the challenges of the Industrial Revolution. When Victoria's reign began in 1837 it was at the height of a major challenge to the established legal order to meet the demands of a new and dynamic industrial economy that was transforming the country. The immense expansion in commerce and industry, the trebling of the population in less than a century, the migration from the countryside to the towns and changing working practices all engendered a need for some kind of reforming social provision or regulation in almost every aspect of national life. Problems of housing, sanitation, water supply, disease and epidemic, of health and safety, of the exploitation of the labour force, of educational provision and, ever present, of pauperism, were all obvious consequences of industrialisation. Less evident were deficiencies in the system of land tenure, notably tithes, copyholds and inclosures, which rendered the country less able to support its growing population. There were also problems arising from advances in technology, principally the railways raising issues of public safety, and from the increased pace of commercial enterprise. And underpinning these were issues of the public revenue needing to be levied from the property and profits of the transformed economy.

The law responded to these imperative challenges by enacting a programme of substantive legislative reform. The working hours of children in factories were restricted, and age limits and opportunities for education introduced. The poor law system was reformed and workhouses created, while public health legislation provided for improved housing, the building of sewers and drains and the provision of fresh water. Land rights were restructured to ensure the full

cultivation of agricultural land, and railway companies came under increasing central regulation both as to competition and public safety. And finally the income tax was reintroduced and its machinery gradually adapted to ensure the country's new commercial wealth was available to support the programme of wider social reform.

This legislation needed a mechanism whereby it could be implemented. The reforms were so urgent, and of such magnitude, that the need was for strong centralised authority and control. In the face of an underdeveloped central government, and an inadequate local government, the task was given to a number of ad hoc agencies of central government. In these commissions and boards lay the genesis of the modern statutory tribunal. Factory Inspectorates, Poor Law Commissioners, Assessment Committees, a General Board of Health, Tithe, Copyhold and Inclosure Commissioners, and various bodies of Railway Commissioners and Tax Commissioners were created, each explicitly designed to implement its own code of reforming legislation. They were appointed by central government, they made policy and both organised and supervised the implementing of the legislation. The practical work was undertaken by their paid functionaries in the localities. It was a system of central supervision and local control that was both pragmatic and effective.

It was clear and foreseeable that this controversial increase in government interference with the private, professional and property affairs of individuals would give rise to disputes between individuals and between individuals and the state. The provision of a system of dispute-resolution was necessary and urgent if the smooth implementation of the legislation was to be ensured, because the opportunity of raising grievances and having them properly addressed was central to pacifying hostile public opinion.

Because the requirements in each case were very specific, the choice of dispute-resolution body was not a straightforward one. First, the personnel had to possess specialist knowledge because the rules to be implemented were not those of the common law, but novel and technical administrative regulations. The restructuring of land rights, for example, would demand a knowledge of agricultural practice and management, while ensuring an efficient and safe railway system would require a knowledge of railway management and engineering skills. Secondly, disputes had to be resolved quickly so as not to hinder the implementation of government policy and to meet public demand, and to do so the procedures had to be simple and informal. The process had to be accessible to be acceptable to the public, and that meant that it had to be affordable. This could only be ensured by making legal representation unnecessary and by keeping the proceedings local. Furthermore, most disputes would be minor ones of fact rather than principle or law, and might be very numerous.

With these very specific requirements, the established organs of dispute-resolution were seen to be inadequate. Though the regular courts of law had the advantages of familiarity, authority, independence, tested procedures and respected judges, they were too slow and the requirement for legal representation also made them prohibitively expensive. And while the judges were experts in law and the handling of evidence, they did not possess the new and necessary technical knowledge. The courts were not suited to handling large numbers of small disputes quickly, and the judges themselves were reluctant to adjudicate what they saw as not law but administrative regulation. County courts appeared possible, but were introduced too late and were soon overburdened with work, and specialist knowledge was lacking; specialist courts were not favoured as they undermined the new rationalisation of the legal system; the Justices of the Peace, apparently almost ideal, were too conservative, independent and busy. Even arbitration, with its informality and specialisation, was rejected as lacking the teeth to enforce controversial reforms. As the limitations of the established institutions of the regular legal system were appreciated, the dispute-resolution function was given to the implementing bodies

themselves. It was at this point, when the administrative body acquired adjudicative functions, that the modern statutory tribunal was recognisable.

Each Act laid down its tribunal's composition, its jurisdiction and to some extent its procedures. When the procedures were not found in the parent Act, each tribunal constructed its own. It is clear from the evidence that the tribunals drew on the courts of law, other orthodox legal processes and institutions, as well as general legal values for their composition and procedures. Nevertheless each was self-contained, an ad hoc body individually conceived to suit the subject matter of the legislation it sought to implement and undertaking a mixture of legislative, administrative and policy functions with strictly circumscribed and subordinate adjudicatory powers. Subject-specificity was all-important because it determined the detail of a tribunal's composition, procedures and, most importantly, its jurisdiction. Each was sui generis and developed in almost total theoretical and practical isolation.

Though the requirements of the various new bodies were in essence the same, whatever the nature of the legislation they were to implement, – namely speed, efficiency and cheapness – no model tribunal was adopted. There was no basic design of a statutory tribunal to which legislators looked when they needed a body to implement a new legislative regime, no blueprint they could work from and amend as they chose to suit their particular needs in that instance. The common denominators were there – a strictly circumscribed jurisdiction composed of administrative and judicial functions, simple procedures, lay and specialised personnel – and in that sense a rudimentary framework which was universally adopted was established in the minds of the legislators. But there existed no fully formed single model, with established and consistent procedures and provisions for appeal, no uniform powers or jurisdiction, no pattern of composition.

The Victorians' approach to the construction of tribunals inevitably, therefore, resulted in a lack of uniformity and a haphazard growth through practice, as well as the establishment and continuation unchecked of insufficiently robust processes. Furthermore, statutory tribunals increased in number, and because their adjudicatory functions were integral to their administrative ones, which in turn were strictly subject-specific, the growth in adjudicative powers by organs of central government grew virtually unnoticed through isolated, self-contained and segregated tribunals. The Victorians had conceived and created an institution that precisely met their needs and they were untroubled by an absence of consistency or common principles. Guided above all by pragmatism, they had no thought to legal theory or to the legislators of future generations. They were equally unconcerned by their new creation's difficulties in establishing a place in the legal system, or indeed its undermining of the legal order. At first tribunals were clearly and unequivocally organs of the executive government, though with varying degrees of independence, and with primarily administrative functions served by subsidiary judicial powers. As administration and adjudication were integrated in this one process, the tribunals were not perceived as posing any challenge to the regular courts or the rule of law. They were regarded as a legitimate and effective administrative response to the challenges of over a hundred years of intensive industrialisation, and any anxiety was on the grounds of increasing state intervention into new spheres of human activity and its accompanying bureaucracy.

But as central government became more sophisticated throughout the nineteenth century it became more able to take on the administrative functions of each tribunal itself. As the tribunals were gradually divested of their administrative duties, their judicial functions became more prominent, and this in turn rendered less tenable the tribunals' clear legal status as primarily administrative bodies. It made them more uniform, the resolution of a dispute in land rights not being markedly different from the resolution of a dispute over assessment to tax for

example, and it led to the natural formation of a discrete class of dispute-resolution bodies of broadly similar character. Tribunals as a genre thereby gained an identity, and as they were inexorably expelled from the political process they struggled to find a place in the legal hierarchy. Not only did they give rise to concern among judges and legal commentators that the rule of law was threatened, but their processes and constitutions were revealed as anomalous in a judicial context. Structurally, functionally and procedurally the tribunals were set apart from the regular courts. Those features that had been acceptable when tribunals were individually conceived organs of government and indeed had been welcomed for achieving swift and specialised justice – namely informal procedures, a lack of publicity, adjudication by non-lawyers and the absence of reasoned decisions and legal representation – were increasingly viewed as abuses of citizens' rights. Standards of justice within tribunal processes were found wanting compared to those in the regular legal system. Furthermore, the close relationship enjoyed by all tribunals with their parent departments, so unexceptionable to the Victorians, had become unacceptable in a legal context. In short, the diversity of form and process which was the legal legacy of the Victorians increasingly undermined modern government's aim to arrive at a coherent structure for the delivery of administrative justice.

And what was not so visible, and yet of practical importance, was that the historical provenance of individual tribunals affected their everyday operation, a problem that was particularly intractable. Though many individual tribunals were working well enough in practice, the settling of their underlying principles at a time when social, economic and fiscal conditions were radically different to today could undermine a tribunal's efficacy as a modern dispute-resolution organ. To take just one example, any close scrutiny of the structures and procedures of the General Commissioners of Income Tax revealed real weaknesses, all of which stemmed from the original historical conception of the General Commissioners as an administrative body to assess to tax, rather than an adjudicating body. This character determined the tribunal's essential structure and procedures, and yet it survived even when the tribunal lost its assessing function and became an exclusively adjudicating body. In wider legal terms this rendered the precise nature of the jurisdiction and role of the General Commissioners uncertain and ambivalent, established a troublesome provision for secret hearings and a fragile independence from the executive. Equally it established one of the most accessible bodies known to the tribunal world. Though in terms of accessibility in its widest sense its historical provenance was beneficial, in terms of independence, training and professional support it was damaging to its functioning. Modern legislators, as aware as their Victorian counterparts of the immense utility of tribunals, were disturbed by their diversity, special features and lack of coherence, and sought to impose order on them. So what had been a strength to the Victorians was regarded as a decided weakness to modern legislators, and their legal legacy constituted a considerable challenge when attempts were made in the following century both to classify the growing numbers of tribunals and ultimately to reform them.

In the magnitude of the task before the reformers of the twentieth century it is easy to dwell on the negative aspects of the Victorian legal legacy. But what is clear is that in producing the concept of the bespoke tribunal in a period of some fifty years from the 1830s to the 1870s, the Victorians showed pragmatic and creative genius. They were prepared to deconstruct legal institutions and practices which had been established for hundreds of years and which had been regarded as indivisible, then to extract the features of each that they regarded as serving their purpose, before reconstructing them in the form they needed. They tried any number of different combinations: lay expert adjudicators, lay expert assessors, professional judges, part time judges, legal experts who were not judges, costs, no costs, appeals, no appeals, limited appeals, legal representation by barristers, solicitors, parliamentary agents, or none at all, combinations of formal adjudication with arbitration or conciliation. They were prepared to experiment and to keep trying new combinations of features as many times as was necessary.

They had a clear end in view, and, with confidence and imagination, used all the dispute-resolution tools at their disposal.

The statutory tribunal of the nineteenth century had developed piecemeal, driven by practical considerations to improvise and compromise, and with no intention of creating a new element in the machinery of justice. It was, however, an enduring success. It displayed such flexibility and utility, and so many advantages over the regular courts, that it became an indispensable and major public institution of the modern world. During the nineteenth century, a period dominated by the pragmatism and imagination of creation, the tribunals' place was broadly as an appendage of government; during the twentieth, where the principal challenge was the theoretical one of classification and place, it was broadly as an appendage of the regular courts; in the twenty-first, with its idealistic aspiration to coherence, effectiveness and direct participation, it would be as a formidable genre of dispute-resolution in its own right. In this, the benefit of the Victorians' innovative genius far outweighs the difficulties of its legal legacy.

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